the employer, but also to volunteers. Where a person has no interest in the work and volunteers his services he stands in the same position as a regular employee and voluntarily assumes the risks attendant upon fellow service.[9] But where the person volunteering has some interest and has the permission of the defendant to do the work he is not a fellow servant.[10]

Some courts have said that the reason for the rule is that the servants being together daily are in a position to influence their fellow servants into using proper care in the exercise of their duties. Following from the reason for it the rule should not apply to those persons who do not come unto close contact with each other.[11] Thus persons working in different departments of the same work who do not come into personal contact with each other are not fellow servants.[12]

Another test which has been laid down is that all engaged in an employment in the exercise of ordinary sagacity would have been able to foresee when accepting it that the negligence of a fellow would probably expose them to injury.[13]

At the present time approximately fourteen states have passed employers' liability acts which either partially or entirely do away with the fellow servant rule.

E. L. H.

PARTNERSHIP—WHAT CONSTITUTES THE RELATION—In *Floyd* v. *Kicklighter*,[1] plaintiff and defendant had entered into what they termed a "partnership agreement" for the purpose of buying and selling a tract of land. Plaintiff agreed to advance $15,000, the price of a tract upon which the defendant had an option, and the defendant with the money so advanced was to buy the land, sell to a purchaser then in prospect for a greater price, and after payment of expense incident to the purchase and sale, the balance of the proceeds was to be equally divided between them; the parties agreed to be jointly liable for expenditures. The court held that these allegations sufficiently stated a case of partnership to withstand a general demurrer.

Efforts have been made rather frequently to formulate a definition of partnership that would be at once both brief and comprehensive.[2] Pothier's definition is this: "*Societas est con-*

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[9] Eason v. R. R. Co. 65 Tex. 577 (1886); N. O. J. & G. N. R. R. v. Harrison, 48 Miss. 112 (1873); Longa v. Stanly Hod Elev. Co., 69 N. J. L. 31 (1903).

[10] Street Ry. Co. v. Bolton, 43 Ohio, 224 (1885); *cf.* Wischan v. Rickards, 136 Pa. 109 (1890).

[11] Beulter v. Grand Trunk Junc. Ry. Co., 224 U. S. 85 (1911).

[12] C. & N. W. Ry. Co. v. Moranda, 93 Ill. 302 (1879); Sullivan v. Mo. Pac. R., 97 Mo. 119 (1888). Under a statute, Meyers v. San Pedro L. A. & S. L. R. Co., 104 Pac. Rep. 736 (Utah, 1909).

[13] Collins vl Whiteside, 75 N. J. L. 865 (1908).

[1] 76 S. E. Rep. 1011 (Ga., 1912).

[2] See definitions collected in Lindley on Partnership. Eighth Edition, pp. 10, 11.

tractus de conferendis bona fide rebus aut operis animo lucri quod honestum sit ac licitum in commune faciendi."[3] In this country the definition contained in Story on Partnership[4] has been quoted probably more often than any other: "Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill or some of them in lawful commerce or business with the understanding that there shall be a communion of the profits thereof between them." Most text-writers, however, refer to partnership not as a contract, but as a relation arising out of contract. The difference of opinion among courts as to what constitutes a partnership, the rather illogical distinction sometimes made between partnerships as to third persons and partnerships between the parties, the abrogation of old rules in more recent decisions, will all appear upon an examination of a few of the more important authorities. The old test that one who shares in the profits is a partner as to third persons, was first announced in *Grace* v. *Smith*,[5] where it was said: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. If anyone takes part of the profits, he takes a part of the fund which the creditor relies upon for payment." In *Waugh* v. *Carver*[6] the court applied the test laid down in *Grace* v. *Smith*, and agreed that while by their agreement "with respect to each other these persons were not to be considered as partners, yet they have-made themselves such with regard to their transactions with the rest of the world." Under these cases it should be noted, that it was a sharing of net profits that constituted a partnership; sharing gross returns was held not to establish the relation either between the parties or in respect to third persons.[7]

A distinction was then made between receiving part of the profits *as profits*, and receiving a sum *in proportion to profits;* the former was held practically to be conclusive evidence of the existence of a partnership, the latter to be entirely consistent with the relation of debtor and creditor and not to be evidence that the parties were partners. This distinction may be found in numerous English and American authorities.[8]

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[3] Pand. Lib. XVII, Tit. 2, Sec. 1, Art. 1.

[4] Seventh Edition, Sec. 2.

[5] 2 W. Bl. 1, 998 (1775).

[6] 2 H. Bl. 235 246 (1793). And see in *accord:* Heskett v. Blanchard, 4 East 145 (1803); Gellar v. Hutchinson, 1 Rose 297 (1812); Cheap v.Cramond, 4 B. & Ald. 663 (1821).

[7] Wilkinson v. Frazier, 4 Esp. 182 (1803); Dry v. Boswell, 1 Camp. 329 (1808).

[8] So *Ex parte* Hamper, 17 Ves. Jr. 410 (1811): "It is clearly settled, though I regret it, that if a man stipulates that he shall have, not a specific interest in the business, but a given sum of money even *in proportion to* a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits *as such*, giving him a right to an account, he is as to third persons a partner, and no stipulation can protect him from loss." *Accord: Ex Parte* Langdale, 18 Ves. Jr. 300 (1811); *Ex parte* Watson, 19 Ves. Jr. 456 (1815); Miller v. Bartlett, 15 S. & R. 137 (Pa., 1826); Brockway v. Burnap, 16 Barb. 309 (N. Y., 1853); see also authorities discussed in Pierson v. Steinmyer, 4 Rich. L. 309 (S. C., 1851), and Eastman v. Clark, 53 N. H. 276 (1873).

In *Cox* v. *Hickman*[9] a new test of partnership was laid down. The House of Lords, by Lord Cranworth, declared that "the liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent. . . . A right to participate in profits affords cogent, often conclusive, evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim, but the real ground of liability is that the trade has been carried on by persons acting on his behalf." Since *Cox* v. *Hickman*, English courts have not regarded a sharing of profits as conclusive evidence of the existence of a partnership, and though the "agency test" seems to have had some qualification in England under the "intent" theory, it has been adopted and approved in many American states.[10]

The court in *Mollwo* v. *Court of Wards*[11] declared that *Cox* v. *Hickman* dissolved the rule of law then existing and laid down principles of decision by which the determination of cases of this kind is made to depend, "not on arbitrary presumptions of law, but on the real intention and contract of the parties." The importance of the intent of the parties has been emphasized in many of the cases. "Intent," however, must not be misconstrued; when the facts are clear the intent is matter of law. So if the parties have assumed the rights and obligations of partners, the relation of partnership will be held to exist, even though they expressly stipulate in the agreement that they are not to be partners,[12] and though the word "partnership" is ued in the agreement, if from all circumstances the contract is inconsistent with that relation, it will be held not to exist.[13]

Beginning with *Cox* v. *Hickman*, in England, there has been a tendency to repudiate the old idea that there can be a partnership as to third persons, when the relation does not exist between the parties themselves, the case of holding out of course apart. This tendency is well expressed in the case of *Beecher* v. *Bush*:[14]

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[9] 8 H. of L. Cas. 268 (1860). And see adopting this "agency test:" Kilshaw v. Jukes. 3 Best & Sm. 847 (1863); Bullen v. Sharp, L. R. 1 C. P. 86 (1865); *Re* English & Irish Church Society, 1 Hem. & M. 85 (1863); Holme v. Hammond, L. R. 7 Ex. 233 (1872).

[10] Eastman v. Clark, 53 N. H. 276 (1873); Central City Savings Bank v. Walker, 66 N. Y. 424 (1876); but *cf.* Leggett v. Hyde, 58 N. Y. 272, 281 (1874); Harvey v. Childs, 28 Oh. St. 319 (1876); Hart v. Kelley, 83 Pa. St. 286 (1877); *Re* Ward, 8 Reporter 136 (U. S. D. C. Tenn., 1879); Beecher v. Bush, 45 Mich. 188 (1881); Culley v. Edwards, 44 Ark. 423 (1884); Buzard v. First National Bank, 2 S. W. Rep. 54 (Tex., 1886); Meehan v. Valentine, 29 Fed. Rep. 276 (Pa., 1886), Wild v. Davenport, 48 N. J. L. 129 (1886).

[11] L. R. 4 P. C. 419 (1872).

[12] Pooley v. Driver, 5 Chan. Div. 458 (1876); *Ex parte* Delhasse, 7 Chan. Div. 511 (1877); Moore v. Davis, 11 Chan. Div. 261 (1877); Manhattan Brass & Manufacturing Co. v. Sears, 45 N. Y. 797 (1871); Cooley v. Broad, 29 La. Ann. 345 (1877); Cothran v. Marmaduke, 60 Tex. 371 (1883); Stevens v. Gainesville National Bank, 62 Tex. 499 (1884).

[13] Livingston v. Lynch, 4 Johns. Ch. 573, 592 (N. Y., 1820); Oliver v. Gray 4 Ark. 425 (1841); Sailors v. Nixon Co., 20 Ill. App. 509 (1886).

[14] 45 Mich. 188 (1881).

"There can be no such thing as a partnership as to third persons, when there is none as between the parties themselves, and third persons have not been misled by concealment of facts or by deceptive appearances."

It is generally conceded that there may be, as in the principal case, a partnership between persons who contemplate but a single venture, such as the shipment and sale of but one lot of goods, or the joint purchase and sale of but one chattel or one piece of land, but there must be clear evidence of an intent to create the rights and obligations ordinarily incident to partnership.[15] There are also numerous cases holding that there may be a partnership, though one party furnish all the capital.[16] It is important to consider, however, in such case, whether the capital is risked in the business, or is to be repaid at all events, in determining whether the money is furnished as partnership capital or merely as a loan.[17]

In our principal case the court intimates that there is a difference in Georgia between what constitutes a partnership as to third persons, and as between the parties themselves; we are not told clearly what would be sufficient to indicate a partnership as to third persons, but "as among partners, the extent of the partnership is determined by the contract and their several interests."[18] It is pointed out that there was here a joint enterprise, a joint risk, a joint sharing of expenses, and a joint interest in profits and losses,—allegations at least sufficient to withstand a general demurrer. It would seem clear either under the "agency test," or having a regard to the legal intent of the parties, that the agreement was one of partnership, and that the plaintiff was entitled to an accounting.

H. A. L.

TORT—NEGLIGENCE OR NUISANCE—An owner of land who causes work to be done thereon by an independent contractor is not liable to third parties for injuries received due to the negligent manner in which such work was done,[1] yet if the nature of the work was such as to result in a dangerous or unsafe condition

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[15] DeBerkom v. Smith, 1 Esp. 29 (Eng., 1793); Purdy v. Hood, 5 Martin N. S. (La., 1827); Solomon v. Solomon, 2 Ga. 18 (1847); *In re* Warren, 29 Fed. Cas. No. 17191; Scule v. Hayward, 1 Cal. 395 (1850); 260 Hogsheads of Molasses, 24 Fed. Cas. No. 14296 (1866); Hill v. Sheibley, 68 Ga. 556 (1882); Commonwealth v. Arnheim, 3 Pa. Sup. 104 (1896).

[16] Pawsey v. Armstrong, 18 Ch. Div. 698, 706 (1881); Emanuel v. Crane, 14 Ala. 303 (1848); Brownlee v. Allen, 21 Mo. 123 (1855); Kuhn v. Newman, 49 Ia. 424 (1878); Pierce v. Shippee, 90 Ill. 371 (1878); Couch v. Woodruff, 63 Ala. 471 (1879); Tyler v. Scott, 45 Vt. 261 (1873).

[17] 22 Amer. & Eng. Cyc. of Law; 2d Edition; p. 34, and cases there cited.

[18] Civil Code of Ga., Sec. 3156.

[1] Bloomer v. Wilbur, 176 Mass. 482 (1900): "The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence and the negligent party is the only one to be held." Welfare v. Brighton R. R. Co., L. R. 4 Q. B. 693 (1869); Uggla v. Brohaw, 117 App. Div. 586 (N. Y. 1907).